

Shooting for Equality: An Analysis of the Market Force Defense As Applied to the U.S. Women’s Soccer Team’s Equal Pay Claim

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INTRODUCTION

In the 2015 Women’s World Cup Final, Carli Lloyd scored the fastest hat trick in World Cup history and captained the United States’ Women’s National Team (“USWNT”) to a 5-2 victory over Japan.¹ A few months later, Lloyd led her team to battle again but this time against a different opponent: The United States Soccer Federation (the “Federation”).² In March of 2016, Lloyd and teammates Hope Solo,

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1. United States Soccer Federation, *World Cup Champions: USA Wins 2015 FIFA Women’s World Cup* (July 5, 2015), <https://www.ussoccer.com/stories/2015/07/05/21/19/150705-wnt-v-jpn-game-story>.

2. The USWNT’s last negotiated CBA expired in 2012. From then until the end of 2016, the team operated under a Memorandum of Understanding (“MOU”) with the Federation that kept intact the terms of the CBA the two parties had last negotiated in 2005. A series of disputes regarding wages, benefits, and playing conditions prevented the two sides from reaching a new CBA in the interim. See Jessica Fletcher, *The Complete and Updated USWNT CBA Timeline*, STARS AND STRIPES FC (Feb. 3, 2017), <https://www.starsandstripesfc.com/2017/2/3/14498152/complete-updated-uswnt-ussf-cba-negotiation-timeline>. In December of 2016, a few days before the MOU expired, the USWNT’s Player’s Association

Alex Morgan, Megan Rapinoe, and Becky Sauerbrunn filed a wage-discrimination complaint against their employer with the Equal Employment Opportunity Commission (“EEOC”).³ The complaint alleged that, despite the historic success of the USWNT, they were paid far less than their male counterparts.⁴ The Federation responded by arguing that the men’s wages were justified as a result of a larger market for men’s soccer. According to the Federation, the men’s team generated more revenue, had higher attendance numbers, and, in any event, the USWNT had negotiated their wages through their collective bargaining agreement (“CBA”).⁵

While it is likely that the USWNT will drop their EEOC complaint after the two sides reached a new CBA in April of 2017,⁶ their dispute with the Federation raises a broader issue that is likely to be litigated in the future: Assuming an employee establishes a prima facie case under the Equal Pay Act (“EPA”) and Title VII, to what extent can an employer rely upon a market force defense when the employer has contributed towards creating and reinforcing unequal market conditions? This Note examines this question through a case study of the U.S. Women’s National Team.

The issue of how a court should evaluate a market force defense is especially important today as social scientists and legal scholars continue to challenge the traditional notion that employers function solely as price-takers.⁷ The reason why courts find market force arguments compelling is because the market seems to function as a neutral, external measure of value that employers can take into account without exercising any of their own subjective discretion.⁸ But research increasingly shows that this assumption about the neutrality and externality of markets is not as well-founded as it appears to be. “Objective” market wages can, and often do, incorporate discriminatory decisions by individual employers, and employers can also influence market value by taking actions that reinforce consumer discrimination. In this and other ways, employers can actively contribute to the unequal conditions in the markets within which they operate.

fired Richard Nichols as legal counsel and replaced Carli Lloyd as its official representative. The two sides continued to negotiate, and in April of 2017, they reached a new CBA that raises players’ salaries; increases bonuses; improves NWSL standards; matches USWNT per diems to those of the male players; and allows the USWNT to control group likeness rights for licensing and non-exclusive rights in sponsorship categories where the Federation does not already have a sponsor. See Andrew Das, *How the US Soccer Team Forged a Deal*, N.Y. TIMES, Apr. 5, 2017, available at <https://www.nytimes.com/2017/04/05/sports/soccer/uswnt-us-soccer-labor-deal-contract.html>. As of December 2017, the USWNT had not withdrawn its EEOC complaint, and the EEOC had not ruled on the issue. See Lindsay Gibbs, *They Persisted: U.S. Women’s Soccer Secures New Deal after Lengthy ‘Equal Play, Equal Pay’ Campaign*, THINK PROGRESS (Apr. 5, 2017), <https://thinkprogress.org/womens-soccer-secures-new-deal-ffe06dc4b9e1/>, (“It’s important to note that although this CBA battle is over, the team is not withdrawing its federal EEOC complaint, which is said to be in late stages of an investigation right now”).

3. See Fletcher, *supra* note 2.

4. See Compl. *Hope A. Solo, et al. v. The United States Soccer Federation*, EEOC Charge No. 440-2016-03560 (Mar. 30, 2016).

5. See Def.[’s] Resp. to Compl., *Hope A. Solo, et al. v. The United States Soccer Federation*, EEOC Charge No. 440-2016-03560 (May 31, 2016) at *2-3.

6. See discussion *supra* note 2.

7. See discussion *infra* Section II, Part B.

8. See discussion *infra* Section II, Part B.

The main argument of this Note is that courts should evaluate the market force defense in light of this reality. By assessing the equal pay dispute between the USWNT and the Federation, this Note sheds light on how a court can engage in this analysis.

Section II of this Note analyzes the current legal landscape for addressing sex-based wage discrimination claims, with a particular focus on how these claims have been addressed in the sports context. Part A begins by describing how the market force defense has been traditionally applied to EPA and Title VII claims and reviews college sports cases where the market force defense has been raised. Part B summarizes research that challenges the deference given to the market force defense and makes the case that courts need to analyze institutional factors in order to ensure that employers are not actively contributing to market disparities. Part C shows how Title IX provides a framework for courts to conduct an analysis of a market-based defense that takes into consideration institutional factors.

Section III of this Note zooms in on the USWNT's claim against the Federation. Part A summarizes the claims made by both sides regarding the wage disparity between the USWNT and the United States' Men's National Team ("USMNT"). Part B then looks at the institutional factors that a court should analyze when evaluating the Federation's market force defense. Ultimately, this paper argues that courts should reevaluate how they assess the market force defense by taking into account institutional, market-related factors that the employer either created, or has the power to change, and to provide an analysis of the USWNT's case against the Federation as an example of what such assessments should look like.

I. THE CONTEMPORARY LEGAL LANDSCAPE FOR ADDRESSING SEX-BASED WAGE DISCRIMINATION

Congress enacted the Equal Pay Act in 1963 as the first civil rights bill aimed at combatting employment discrimination specifically with respect to wage disparities between men and women.⁹ A year later, Congress passed the Civil Rights Act of 1964 and supplemented the Equal Pay Act with Title VII, which more broadly prohibits private employers from discrimination based on race, sex, religion, or national origin in all aspects of the employment relationship.¹⁰

Title VII and the EPA both employ burden-shifting frameworks.¹¹ The

9. 29 U.S.C § 206(d) (2012); *see also* EEOC, *The Law*, <https://www.eeoc.gov/eeoc/history/35th/thelaw/>.

10. 42 U.S.C. § 2002e-2 (2012).

11. Establishing a *prima facie* case for a wage-discrimination claim under the two laws is different. Under Title VII, a plaintiff establishes a *prima facie* case by showing that 1) she belongs to a protected class, and 2) she occupies a job similar to that of the higher-paid employee. Once the plaintiff establishes a *prima facie* case, the burden shifts to the employer to show a legitimate, non-discriminatory reason for the adverse employment action. If the employer meets this requirement, the burden shifts back to the plaintiff to show the employer's reasons were pretextual. Under the EPA, a plaintiff establishes a *prima facie* case by showing that "(1) she was performing work which was substantially equal to that of the male employees considering the skills, duties, supervision, effort and responsibilities of the jobs; (2) the conditions where the work was performed were basically the same; [and] (3) the male employees were paid more under such circumstances." *See* *Mehus v. Emporia State*

plaintiff has the initial burden of establishing a prima facie case, after which the defendant can raise an affirmative defense.¹² Because of the overlap between the two laws in addressing sex-based wage discrimination, Congress passed the Bennett Amendment to make the defenses under the EPA available in Title VII cases as well.¹³ Employers can avoid liability in a wage-discrimination case by showing that they determine compensation based on “1) a seniority system; 2) a merit system; 3) a system which measures earning by quality or quantity of production; or 4) a factor other than sex.”¹⁴

Professional sports teams are generally immune from litigation under Title VII¹⁵ because the statute provides an additional exception that allows employers to discriminate based on a protected classification, such as sex, if it is a bona fide occupational qualification (“BFOQ”).¹⁶ A BFOQ applies if sex-based employment decisions are “reasonably necessary to the normal operation of that particular business or enterprise”¹⁷ Although the BFOQ exception is said to be a narrow one,¹⁸ courts have found that it applies to sports teams.¹⁹ Thus, a female basketball player cannot sue under Title VII to play in the men’s National Basketball Association (“NBA”) because being a man is considered a qualification of men’s basketball. Such a claim would be doubly problematic under the EPA because the EPA’s prima facie case requires a female plaintiff to identify a male comparator;²⁰ i.e., a male employee who holds substantially same job as she has and receives greater compensation for it. A further impediment to wage challenges spring from the fact that Title VII allows discrimination by sex in terms of eligibility for sports teams; as a result, men and women’s sports leagues are often institutionally separated. A player in the Women’s National Basketball Association (“WNBA”)

Univ., 222 F.R.D. 455, 472, 480 (D. Kan. 2004) (quoting *Tidwell v. Fort Howard Corp.*, 989 F.2d 406, 409 (10th Cir.1993)).

12. *Id.* at 472 (quoting *Tidwell*, 989 F.2d at 409).

13. *See County of Washington v. Gunther*, 452 U.S., 161, 168 (1981) (holding that the Bennett Amendment incorporates the four affirmative defenses available under the EPA in wage-discrimination cases).

14. 29 U.S.C. § 206(d)(1) (2012).

15. The teams themselves qualify for a BFOQ but a plaintiff could still bring a Title VII claim against a team for discriminating in coaching, management, or in any other job related to the operations of the team. For example, a group of women obtained a settlement in 2003 against the Phoenix Suns for discriminating against when it came to hiring staff for the “Zoo Crew,” a group that provided entertainment during basketball games. *See EEOC, EEOC Resolves Sex Discrimination Lawsuit against NBA’s Phoenix Suns and Sports Magic for \$104,5000* (Oct. 9, 2003), <https://www1.eeoc.gov/eeoc/newsroom/release/10-9-03b.cfm?renderforprint=1>.

16. 42 U.S.C. § 2000e-2(e).

17. *Id.*

18. *See* 29 C.F.R. § 1604.2(a) (“The [EEOC] believes that the bona fide occupational qualification exception as to sex should be interpreted narrowly”); *see also UAW v. Johnson Controls*, 499 U.S. 187, 201 (1991) (“The BFOQ defense is written narrowly, and this Court has read it narrowly”).

19. *See Graves v. Women’s Professional Rodeo Ass’n, Inc.*, 907 F.2d 71, fn. 3 (8th Cir. 1990) (stating in a footnote that the employer in this case, a women’s professional rodeo club, could have excluded the male plaintiff and not been in violation of Title VII because the legislative history of Title VII considered and accepted professional sports teams divided by sex).

20. *See Mehus*, 222 F.R.D. at 472 (D. Kan. 2004) (“Under the EPA, the first step is to identify male and female comparators whose jobs may be . . . substantially equal”).

cannot sue the NBA or the WNBA under the EPA because the NBA is not her employer.

College sports, on the other hand, have produced a hotbed of litigation under the EPA and Title VII because of how they are structured. Colleges are responsible for administering athletic programs for both men and women,²¹ and college coaches are employees eligible for protection under the EPA and Title IV. Thus, courts have held that because colleges and universities set the salaries for both men's and women's coaches, female coaches can bring wage-discrimination claims based on unjustified disparities between their salaries and the salaries of their male counterparts.²² Once a plaintiff is able to establish a *prima facie* case under the EPA, she usually has a disparate treatment claim under Title VII as well.²³

When sued in this context, colleges have often raised arguments tied to market forces in order to avoid liability. In a typical case, a female coach of a women's sports team will sue the college for being paid less than her male counterpart. In response, the college will first argue that the plaintiff cannot establish a *prima facie* case under the EPA because the two jobs are not equal. Even if the two employees coach the same sport, the college will say that the men's coach has additional responsibilities that make an apples-to-apples comparison impossible. These responsibilities are usually related to market forces—defined for the purposes of this paper as external conditions that an employer argues are driven by consumer preferences—and could include revenue-generation, media attention/popularity, and more departmental responsibility, including the supervision of a larger staff. If a court rejects this argument and finds that the plaintiff is able to establish a *prima facie* case under the EPA, the college will invoke a market force argument again but this time as an affirmative defense. If

21. College athletes are considered “amateur athletes” and do not receive compensation. See NCAA, *Amateurism*, <http://www.ncaa.org/amateurism> (outlining the criteria for what qualifies as an amateur athlete under NCAA guidelines). This makes them ineligible for protection under Title VII and the EPA. For a discussion on why college athletes should be eligible for Title VII protection, see Kristi L. Schoepfer, *Title VII: An Alternative Remedy for Gender Inequity in Intercollegiate Athletics*, 11 MARQ. SPORTS L.REV. 107 (2000).

22. While this example assumes the female coach is coaching a women's sports teams and the male comparator is coaching a men's sports team, one can imagine a number of variations to this situation, some of which would be violations to the EPA and Title VII and others that wouldn't. For example, a university could have all female coaches for both men and women's sports. In that case, there would be no violation under the EPA because there would no comparator of the opposite sex. See *EEOC v. Madison Comm. Unit School Dist. No. 12*, 818 F.2d 577, 581 (7th Cir. 1987). One can also imagine a scenario where a male head coach of a women's sports team is paid less than a female head coach of men's team and could theoretically have an EPA and Title VII claim. This situation would be extremely rare because only three percent of all NCAA men's Division I head coaches in 2015 were women. See MC Barrett, *There are Fewer Women Coaches in College Basketball Now Than There were a Decade Ago*, FIVETHIRTYEIGHT (Jan. 19, 2016), <https://fivethirtyeight.com/features/there-are-fewer-women-coaches-in-college-basketball-now-than-there-were-a-decade-ago/>. Even among women sports, women coaches account for only 38 percent of all coaching jobs. See UNIVERSITY OF MINNESOTA, *The Decline of Women Coaches in Collegiate Athletics* (2013), available at http://www.cehd.umn.edu/tuckercenter/library/docs/research/2012-13_Decline-of-Women-College-Coaches-Report_Dec-18.pdf.

23. See *Lewis v. Smith*, 255 F.Supp.2d 1054, 1059 (D. Ariz. 2003) (“Equal Pay Act claims are also cognizable as disparate treatment claims under Title VII”).

the men's sport generates revenue,²⁴ the university will try to justify paying the men's team coach more by counting revenue as a "factor other than sex." Another market-based defense offered by colleges and universities is that the market requires paying the men's team coach more because the average pay given to men's team coaches at competitor schools is higher than those of women's teams.²⁵ Essentially, the college argues that it is simply a price-taker and cannot be held liable for an external determination of value.²⁶

Part A of this Section analyzes the market force defense as applied by colleges as a "factor other than sex" in wage-discrimination cases.²⁷ The Federation raised this defense in response to the USWNT's wage-discrimination complaint. Analyzing how these wage-discrimination cases are analyzed in college sports can provide insight on how the EEOC or a court will evaluate the USWNT's EPA and Title VII claim because, like a college athletics program, the Federation is responsible for both male and female athletic opportunities and is thereby arguably open to liability under the EPA and Title VII.

Part B of this Section takes a closer look at some of the underlying assumptions that guide the deference given to the market force defense. It makes the case that while the market may seem to provide an external, objective measure of value, the market itself is often shaped by discriminatory decisions made by the employers themselves. This section also argues that relying upon market value may reinforce these decisions and the institutional disparities that follow, as well

24. Only men's football and basketball programs generate consistent revenue for major NCAA Division I colleges. College football is by far the most profitable sport and college football revenues often provide funding for other sports. See Kristi Dosh, *Which Sports Turn a Profit?*, THE BUSINESS OF COLLEGE SPORTS (July 19, 2011), <http://businessofcollegesports.com/2011/07/19/which-sports-turn-a-profit/>.

25. It is important to note that the employer is not arguing that male coaches are paid more than female coaches in the market and therefore the employer should not be held liable for following this norm. The EEOC has rejected this theory as a defense under the EPA and Title VII. See EEOC, *Enforcement Guidance on Sex Discrimination and the Compensation of Sports Coaches in Educational Institutions*, No. 915.002 (1997), available at <https://www.eeoc.gov/policy/docs/coaches.html> ("The 'market rate' defense, which has been rejected by the courts and the [EEOC], is based on the employer's assumption that 'women are available for employment at lower rates of pay due to 'market' factors such as the principle of supply and demand"). In this example, the employer is arguing coaches of men's sports teams on average receive a higher pay than coaches of women's sports teams. The employer is thus emphasizing the sex of the sports teams and not the sex of the employee, a factor that an employer is allowed to consider if the different sexes of the teams result in different work responsibilities. See *Madison Comm. Unit School Dist. No. 12*, 818 F.2d at 584 (stating that the district court erred in finding that the sex of the teams themselves could not be considered as a "factor other than sex" upon which the defendant could rely upon).

26. For more on how the market force defense works, see generally Sharon Rabin-Margalioth, *The Market Defense*, 12 U. PA. J. BUS. L. 807 (2010) (explaining how the market force defense may rely on unfounded assumptions about the nature of markets).

27. As the example indicates, defendants also try and invoke market forces to argue that the plaintiff cannot establish a prime facie case in the first place. This Note focuses exclusively on using market forces as a defense because the Federation did not challenge that the USWNT could establish a prime facie case in its reply to the USWNT's EEOC complaint. It questioned the factual allegations made by the USWNT, but focused its legal arguments on the defenses available under the EPA and Title VII. Def[']s] Resp. to Compl., *supra* note 5.

as discrimination by consumers that employers may have cultivated. By challenging the assumptions made by the market force defense, I argue for an alternate framework that would better meet the purposes of the EPA and Title VII.

Often times, a coach at a high school or college bringing a lawsuit under the EPA and Title VII will also have a cause of action under Title IX. While the EPA and Title VII apply generally to almost all public and private employers, Congress passed Title IX in 1972 to specifically address gender inequity in education programs receiving federal funding.²⁸ Parts of Title IX were modeled after the 1964 Civil Rights Act²⁹ and courts have applied Title VII standards to employment discrimination cases brought under Title IX.³⁰ Title IX stands out from the EPA and Title VII, both in its goal and its application. Nevertheless, Title IX provides a useful model in evaluating market force arguments in the employment context. In Title IX athletics cases, courts have explicitly rejected the idea that colleges and high school athletic programs can satisfy its requirements by meeting a “relative interest” test—that is, men’s and women’s comparative interest in participation in organized sports.³¹ The “relative interest” claim under Title IX is an analog to the market force defenses raised under Title VII and the EPA.³² Courts, by and large, have rejected the relative interest test. Instead, courts have enforced the Department of Education’s (“DOE”) three-prong test for compliance, a standard that assumes gender inequality in sports to be a function of historical disparate treatment and places the onus on the institution to actively address this disparity.³³ Though the statutory purpose of Title IX differs from that of the EPA or Title VII, Title IX athletics cases provide an alternative paradigm that courts could adopt when analyzing the market force defense in wage-discrimination cases.

Title IX is especially helpful in understanding the USWNT dispute because, unlike wage-discrimination cases, Title IX litigation focuses on the institution instead of an individual. In a typical case, a plaintiff suing a college under Title IX isn’t seeking redress only for herself but is claiming that the women’s sports program as a whole has received unequal treatment by the university. This is analogous to the situation with the USWNT. Though only Carli Lloyd and a few others are the actual named plaintiffs in the complaint, a court has to look to institutional factors—such as TV deals, advertising, and youth development—that may have caused the Federation to actively contribute towards the unequal market for women’s soccer. Only by understanding institutional disparities will a court be able to effectively rule on the merits of the individual wage-discrimination claims because, as is the case with college coaches, the market value of individual athlete is significantly tied to the market value of the sport as

28. 20 U.S.C. § 1681 et. seq. (2012); *see also* Title IX Info, *History of Title IX*, <http://www.titleix.info/History/History-Overview.aspx>.

29. *See* U.S. Dep’t. of Justice, *Title IX*, <https://www.justice.gov/crt/title-ix> (“Congress consciously modeled Title IX on Title VI of the Civil Rights Act of 1964”).

30. *See e.g.*, *Johnson v. Baptist Med. Ctr.*, 97 F.3d 1070, 1072 (8th Cir. 1996) (stating that when a plaintiff brings an employment discrimination case under Title IX, the method of evaluation “is the same as those in a Title VII case”).

31. *See* discussion *infra* Part C of this Section.

32. *See* discussion *infra* Part C of this Section.

33. *See* discussion *infra* Part C of this Section.

a whole. Title IX offers a framework for courts to conduct this inquiry and is discussed in detail in Part C of this Section.

A. The Market Force Defense in College Sports

The EEOC—the independent agency responsible for interpreting, administering, and enforcing the EPA and Title VII—recognized the potential for sex discrimination in college sports and, in October of 1997, issued an enforcement guidance to help courts and universities address this problem.³⁴ At the time, men’s sports within the NCAA received 60 percent of all head coach salaries and 76 percent of assistant coach salaries.³⁵ The EEOC perceived this disparity as reinforcing gender inequality and sought to address how claims brought under the EPA and Title VII in these types of cases should properly be resolved.³⁶

The EEOC’s enforcement guidance paid special attention to the revenue-generation and market force affirmative defenses available to universities under the EPA and Title VII. It acknowledged that generating more revenue might constitute a valid defense in some situations, but also found that women’s teams have been historically underfunded compared to men’s teams.³⁷ Thus, if a university had discriminatorily provided fewer resources to a women’s team and thereby reduced the team’s ability to generate the same revenue, the university could not then rely upon evidence of less revenue as an affirmative defense under the EPA and Title VII.³⁸

The EEOC went on to address the circumstances in which the marketplace could be a factor to justify paying women coaches less. It identified two types of defenses under this theory: a “marketplace value” defense and a “market rate” defense.³⁹ It rejected the latter because it is based on an employer’s assumption that women command lower rates in the marketplace due to “‘market factors’ such as the principle of supply and demand.”⁴⁰ It found the former acceptable in some situations because an employee’s value was not determined based on their gender but rather on their ability to set wages for themselves. Still, the EEOC warned that “[s]uch consideration will qualify as a factor other than sex only if the employer can demonstrate that it has assessed the marketplace value of the particular individual’s job-related characteristics, and any salary discrepancy is not based on sex.”⁴¹ The EEOC’s commentary on these issues reflects its concern with employers manipulating affirmative defenses to justify sex-based wage discrimination.

The question of whether a defendant could rely upon an affirmative defense under the EPA related to market forces when the defendant had potentially contributed to the uneven market was raised by Marianne Stanley in her lawsuit

34. EEOC, *supra* note 25.

35. *Id.* (citing NCAA, 1997-98 *Gender-Equity Study* (1999), available at <http://www.ncaa.com/publications.com/productdownloads/GEQS98.pdf>).

36. *Id.* (citing Amy Shipley, *Most College Funding Going to Men’s Sports*, WASH. POST, April 29, 1997, at E1).

37. *Id.*

38. *Id.*

39. EEOC, *supra* note 25.

40. *Id.* See also discussion *supra* note 25.

41. *Id.*

against the University of Southern California (“USC”).⁴² Stanley achieved great success as the women’s basketball coach at USC, winning almost sixty percent of her games and leading the Trojans to the NCAA Tournament three straight seasons before being fired.⁴³ She sought equal pay to George Raveling, the men’s basketball coach who was paid almost double Stanley’s salary despite an underwhelming 99-103 record during his seven-year tenure.⁴⁴ Stanley tried negotiating a new contract with USC’s athletic director Michael Garrett, but the two failed to reach an agreement.⁴⁵ The final discrepancy between their two proposals was between \$14,000 and \$18,000 over a span of three years.⁴⁶ Garrett eventually fired Stanley, prompting her to sue the university for sex-based wage discrimination.⁴⁷

The Ninth Circuit first ruled on Stanley’s case in 1994 after a federal district court in Los Angeles denied her motion for a preliminary injunction. In *Stanley I*, the court affirmed the district court’s ruling because it found no clear showing that Stanley would prevail on the merits of the case.⁴⁸ The court found that, in addition to coaching, Raveling’s responsibilities included public relations activities, which resulted in the men’s basketball team generating 90 times the revenue of the women’s team.⁴⁹ It noted that “[a]n employer may consider the marketplace value of the skills of the particular individual when determining his or her salary. Unequal wages that reflect market conditions of supply and demand are not prohibited by the EPA.”⁵⁰

After a series of pre-trial motions, the district court eventually granted summary judgment in favor of the defendants in March of 1995, almost two years after Stanley filed the initial complaint.⁵¹ No other program hired Stanley during this time period, so she worked in the furniture business to make ends meet.⁵² George Raveling had also left USC by this time to pursue a career in broadcasting with CBS.⁵³ The case was appealed and eventually reached the Ninth Circuit again in June of 1999. By then, Stanley was the head coach at the University of California Berkeley, after completing a short stint at Stanford where she won National Coach of the Year in 1996.⁵⁴

42. See *Stanley v. Univ. of S. Cal.*, 178 F.3d 1069 (9th Cir. 1999) (hereinafter, “Stanley II”).

43. See Malcolm Moran, *Dispute Over Equality Leaves a College Coach Jobless*, N.Y. TIMES (Sep. 14, 1993), available at <http://www.nytimes.com/1993/09/14/sports/colleges-dispute-over-equality-leaves-a-coach-jobless.html?pagewanted=all>.

44. *Id.*

45. *Id.*

46. *Id.*

47. *Stanley II*, 178 F.3d at 1073.

48. *Stanley v. Univ. of S. Cal.*, 13 F.3d 1313, 1320 (9th Cir. 1994) (hereinafter, “Stanley I”).

49. *Id.* at 1321.

50. *Id.* at 1322 (internal citations omitted).

51. *Stanley II*, 178 F.3d at 1073.

52. See Jeremy Stone, *Stanford and Marianne Stanley Proved a Perfect Match*, THE STANFORD DAILY (June 5, 1999), available at <https://stanforddailyarchive.com/cgi-bin/stanford?a=d&d=stanford19960605-01.2.65&e=---en-20-1-txt-txIN---#>.

53. *Id.*

54. University of California, *Marianne Stanley Official Bio* (Apr. 4, 2017), <http://www.calbears.com/news/2013/4/17/208200372.aspx?path=wball>.

On appeal, USC challenged Stanley's prima facie case under the EPA by arguing that the additional responsibilities of the men's head coach made the two jobs "substantially different," thereby justifying paying Stanley less than Raveling.⁵⁵ USC claimed that "there simply is not a sufficient spectator or media market for women's basketball games," which meant Stanley did not have the pressure Raveling felt to generate revenue.⁵⁶ Stanley responded that USC's previous decisions to develop the men's basketball program at the expense of the women's team created this discrepancy in responsibility and thus could not be relied upon by the university.⁵⁷

Instead of letting this question be litigated at trial, the Ninth Circuit affirmed summary judgment on the alternative grounds that Stanley had less coaching experience compared to Raveling.⁵⁸ Raveling was hired with fourteen more years of coaching experience than Stanley and had nine years of additional marketing and promotional experience.⁵⁹ Stanley countered that this reason was merely pretextual, but the court held that she had failed to provide a material fact to support the pretext claim.⁶⁰ As a result of shifting to the experience ground as a "factor other than sex," the court avoided the question of whether a defendant can raise a defense based on market forces in an EPA case when it bore at least some responsibility for those market forces.

Courts since *Stanley* have yet to resolve the issue raised by defendants who defend EPA claims based on market forces that they have helped to create. Even courts that have ruled in favor of plaintiffs in such cases have finessed the issue rather than fully confront it. In *Lewis v. Smith*, a federal district court in Arizona found that market forces did not justify paying a male women's basketball assistant coach less than a female coach with the same position.⁶¹ The defendant, Arizona State University, argued that "[the female assistant coach] was paid more because the market for her services was more competitive and [the female assistant coach] needed a higher salary to lure her away from a head coaching job at California."⁶² The court clarified that the defendant had to show that the market for the female assistant coach's skills was higher than those of the plaintiff but reiterated *Stanley*'s interpretation of market force defense, which allowed for unequal wages based on supply and demand forces.⁶³

A year later, in *Mehus v. Emporia State University*, a federal district court in Kansas ruled in favor of a female volleyball coach on a wage discrimination claim brought against Emporia State University ("ESU") under the EPA.⁶⁴ Maxine

55. *Stanley II*, 178 F.3d at 1074.

56. *Id.* at 1075.

57. *Id.* at 1074-75.

58. *Id.* at 1075.

59. *Id.*

60. *Id.* at 1076.

61. 255 F.Supp. 1054, 1062-63 (D. Ariz. 2003). The court in this case did not find an EPA violation because they did find that the plaintiff established a prima facie case under Title VII.

62. *Id.* at 1062.

63. *Id.* at 1063.

64. 222 F.R.D. 455 (D. Kan. 2004). Mehus also brought a Title VII claim against ESU, arguing that she was subject to different requirements, received fewer resources, and was paid less than her male

Mehus, the women's volleyball coach at ESU, alleged that she was paid less than two male comparators—the men's basketball coach and the women's basketball coach—for substantially the same work.⁶⁵ After finding that Mehus was able to establish a prima facie case for wage discrimination under the EPA, the court considered ESU's market force defense.⁶⁶ ESU argued that it properly relied on free market forces when paying the men and women's basketball coaches more than Mehus because the salary for their services was greater in the free market than those of Mehus and that, based on linear regression analysis, Mehus's salary was actually greater than other women's volleyball coaches in ESU's conference.⁶⁷ The district court rejected both arguments on the grounds that ESU could not provide conclusive evidence to show how it determined market value or prove that it relied on market forces in such a way that "no rational jury could find to the contrary."⁶⁸

While both *Lewis* and *Mehus* indicate that courts are not accepting defendants' market force defenses at face value, they also reveal a sense of unwillingness on the part of courts to engage on a deeper level of analysis that takes into account institutional disparities that contribute to wage discrimination. In *Mehus*, for example, the court did not foreclose the possibility that the defendants could establish an affirmative defense based on market forces; it only determined that it had not done so at this point in the litigation.⁶⁹ Though the court did rightly question how market value was determined, it did not ask what factors contributed to the potentially uneven market and whether ESU had contributed to this inequity. This type of analysis is difficult, especially in a case like *Mehus*, which compared a female coach with male coaches of a different sport, one of which was a women's team.⁷⁰ Yet, as Part C will discuss, this is the exact type of analysis that courts have effectively engaged in the Title IX context. Though Title IX serves a different legislative purpose than Title VII or the EPA, it was once debated whether it would be subject to its own version of a market force defense.⁷¹ Courts rejected this possibility on the grounds that historic unequal treatment on the part of colleges and universities accounts for the disparate consumer preferences that comprise the market for college sports. Part B discusses why it may be time for courts to recognize the same phenomenon with respect to the market force defenses available under Title VII and the EPA as well.

counterparts. On the wage discrimination claim under Title VII, the court found that the plaintiff had established a prima facie case and rejected ESU's market force defense for the same reasons it rejected the defense under the EPA claim.

65. *Id.* at 466-67.

66. *Id.* at 476-77.

67. *Id.* at 478.

68. *Id.* at 479.

69. *See id.* at 479 (finding that defendants had not established for the purposes of summary judgment whether plaintiff was paid fair market value, but would have the opportunity to do so at trial).

70. *Id.* at 466.

71. *See* discussion *infra* Part C of this Section.

B. Challenging Traditional Market Assumptions

Courts give credence to the market force defense on the theory the market comprises an external force that removes discretion—and thus discrimination—on the part of the employer.⁷² This relies on two assumptions: 1) employers operate as wage-takers, meaning that the wages they offer are set by an objective market rate as determined by supply and demand forces, and 2) an efficient labor market comprised of rational actors will eliminate discrimination over time.⁷³ Social scientists and legal theorists have challenged both assumptions in recent years.

Regarding the first assumption, scholars have challenged the notion that wages set by market value reflect an objective evaluation of labor that is free from subjective discretion on the part of employers. Often times, market wages that seem “objective” include internalized subjective evaluations.⁷⁴ Two examples of subjective factors that can influence either individual employers or a set of employers comprising a given market include the consideration given to geographic flexibility and the premium value an employer assigns to employees.⁷⁵ An employer giving consideration to the geographic flexibility of an employee can drive up the wages paid to certain employees without the increase in wages reflecting an objective evaluation of value. For example, two employees, A and B, could apply to or work at the same job and should be paid the same wage based on a similar set of skills and equal productivity. However, one of the employees, say employee A, may be able to obtain higher wages from the employer if he is more geographically flexible. Employees with more geographic flexibility can command higher wages both at the initial negotiation for a salary and when being considered for a raise.⁷⁶ While one could argue that this is consistent with the supply and demand theory of market forces i.e., geographic flexibility is a skill the market values, it is still discretionary on the part of employers to give it credence all else being equal. The fact that an employee’s “objective” market value can incorporate a discretionary choice on the part of employers challenges the notion that employers function solely as wage-takers and that supply and demand forces somehow operate outside of the influence of the decisions made by individual employers.

Another way in which an employer’s subjective preferences and discretion can influence market value is through premium value, which is the value that employers assign to employees.⁷⁷ This value may solely be based on work-related qualities, like whether an employee has a certain training or qualification, but could also include subjective factors like an employer’s preference for employees of a certain race or gender. An employer who could theoretically obtain labor at a

72. See Rabin-Margoloth, *supra* note 26, at 811.

73. See *id.*

74. See generally Thomas H. McCarthy, Note, ‘Market Value’ as a Factor other than Sex in Sex-Based Wage Discrimination Cases, 102 U. ILL. REV. 1027 (1985).

75. See *id.* at 1044-46.

76. *Id.* at 1044; see also Steven Raphael & David A. Riker, *Geographic Mobility, Race, and Wage Differentials*, 45 J. URB. ECON., 17 (1999) (“[W]e find that mobility positively affects and partially explains racial and ethnic earning differentials”).

77. For a general discussion on how premium values can contribute to employer discrimination, see Richard Posner, *Economic Analysis of Law*, 525-28 (2d ed. 1977).

lower rate may pay more for the opportunity to hire men, for example. Economists dub this phenomenon “a taste for discrimination.”⁷⁸ If the premium value an employer assigns an employee is based on subjective factors, it can artificially increase the value of that employee in the marketplace as a whole because past wages are often used as a starting point for future salaries.⁷⁹ It is also possible for a set of employers to independently assign a premium value to a certain characteristic, like a particular race or sex, which can artificially raise the market value of the benefitting group. Again, an employee’s objective market value can potentially incorporate discretionary choices on the part of employers, thereby questioning the idea that employers simply respond to markets as they are rather than actively shaping them through their discretion.

As for the second assumption, there is evidence that instead of eliminating discrimination, relying on wages determined by market forces reinforces its roots. There are a number of factors that help explain this phenomenon. For example, social scientists have found that part of the reason for the wage gap between men and women is because women negotiate less often for their starting wages than men and are also less likely ask for a raise.⁸⁰ The relative willingness on the part of men to negotiate for their wages stems from societal differences in how they are raised.⁸¹ Young boys are encouraged proactively ask for things and are taught that they have control over their situation.⁸² In contrast, girls are taught to prioritize the needs of others and to apply less control over their environments.⁸³ This form of societal discrimination that prevents women from achieving equal pay is more likely to be reinforced rather than corrected by the market, especially if market wages continuously reflect this internalized form of discrimination.

Another existing societal inequity are discriminatory consumer attitudes. Consumers routinely discriminate base on race: One study found that buyers were 17% less likely to include their name in emails to Black sellers compared to White sellers; 44% less likely to accept delivery by mail; and 56% more likely to express concern about making long distance payments.⁸⁴ Consumers also discriminate based on sex: A marketing company analyzed responses from its clients regarding their satisfaction with their client service representatives and found that clients undervalued female markets by 21%.⁸⁵ Employers take customer preferences as

78. Gary Becker, *The Economics of Discrimination*, 16-17 (2d ed. 1971).

79. For more on how past salaries contribute to the wage disparity between men and women and how some states are addressing this issue through legislation, see Alicia Adamczyk, *How Banning Employers from Asking about Salary History Could Help Close the Wage Gap*, TIME (Aug. 11, 2016), <http://time.com/money/4448143/ban-salary-history-wage-gap/>.

80. Rabin-Margalioth, *supra* note 26, at 814; see also Linda Babcock & Sarah Laschever, *Women Don’t Ask: Negotiation and the Gender Divide* (2002).

81. Babcock & Laschever, *supra* note 80, at 62-84.

82. *Id.*

83. *Id.*

84. Katharine T. Bartlett & Mitu Gulati, *Discrimination by Customers*, 102 IOWA L. REV. 223, 224 (2016) (citing Jennifer L. Doleac & Luke C.D. Stein, *The Visible Hand: Race and Online Market Outcomes* (Jan. 25, 2015) (unpublished manuscript), <http://ssrn.com/abstract=1615149>).

85. *Id.* at 225 (citing Bryce Covert, *Female Client Service Reps Get Lower Scores Despite Better Performance and Experience*, THINK PROGRESS (May 22, 2014), <https://thinkprogress.org/female-client-service-reps-get-lower-scores-despite-better-performance-and-experience-dfa457062f5c#.yduju1f46m>).

givens and shape their products and services, including the characteristics of their employees, to these preferences. In doing so, one might think that these preferences are an objective fact, outside the control of employers. Yet it is important to see that consumers and employers function in a dynamic relationship when it comes to determining an employee's "objective" market value. For example, an employee may receive negative reviews from consumers based on prejudice regarding the employee's race or sex. As a result, the employer may have an objective, business-related reason to fire the employee or pay him or her less under the guise of poor performance. In this case, the "objective" evaluation of the employee would be based on discrimination, albeit on the demand side instead of the supply side. By catering to this discrimination, employers legitimize and reinforce it.

Consumer discrimination is especially prevalent in the context of equal pay in coaching for college sports. As Professors Katharine Bartlett and Mitu Gulati describe:

Colleges and universities often pay the coaches of their men's basketball teams (mostly male, in part because of the preferences of the players) more than the coaches of female basketball teams (mostly female because, among other things, these jobs generally pay less). The jobs are arguably similar in skill, effort and responsibility—the factors that matter under the Equal Pay Act—and a school's women's team is sometimes more successful than the men's team. The usual justification for the pay differentials in coaching, which courts have accepted, is that men's teams are revenue-producing and thereby involve working conditions with more stress and responsibility than women's teams, which are not revenue-producing. This distinction explains the salaries of the most highly-paid coaches but it masks the fundamental dynamic at play: the reason men's teams produce more revenue is that the public disproportionately prefers to watch men's games—i.e., customers discriminate.⁸⁶

One could argue that consumer discrimination in sports is not based on sex, but rather on quality of the product: consumers could prefer watching men's sports compared to women's sports because of physiological differences between the two sexes that give men an advantage in certain sports and consequently create a larger market for men's sports. However, as Professor Deborah Brake points out, "[t]he revenue rationale for retaining the status quo in sport draws on deeply imagined beliefs about differences in men's and women's bodies. It assumes the preference for watching men's sports is natural, rather than socially or institutionally constructed."⁸⁷ She goes on to argue that

The popularity and revenue-producing potential of a sport is certainly not natural; it is carefully promoted and nurtured by the machinery of college (and professional) athletics. It is a product of countless social and institutional factors, including longstanding and continuing investments in facilities, personnel, programs, recruiting, marketing, and coaching, just to name a few. These investments contribute to a certain image and status of a sport that greatly affect its marketability. The existence of average differences in male and female bodies

86. *Id.* at 231-32.

87. Deborah Brake, *Revisiting Title IX's Feminist Legacy: Moving Beyond the Three-Part Test*, 12 AM. U. J. GENDER, SOC. POL'Y & L. 453, 480 (2004).

in height and upper body strength does not “naturally” translate into inequality in markets and spectatorship. In a different sports culture, shaped by different institutional practices, for example, women’s basketball, with its emphasis on passing, teamwork, and communication might be more highly valued and watched than a dunking match between superstars. To the extent that appeals to market justifications succeed in this context, they do so because they tap into deeply held and little-examined beliefs that locate sex inequality in sports in male and female bodies.⁸⁸

As Professor Brake describes, the market for sports is not solely driven by consumer preferences; it is recreated and reinforced by employers through investment, personnel, recruiting, and marketing decisions. And, like the market for college sports, the market for international soccer is heavily influenced by these factors. Section III of this Note will analyze these factors in the context of the USWNT dispute.

* * *

The purpose here is not to argue that courts fundamentally misunderstand markets but rather to highlight the complexity of the factors that underlie even the most basic economic assumptions. As legal scholars and social scientists continue to challenge traditional free market principles, courts may need to reevaluate how they analyze the market force defense in order to ensure that the purposes behind the EPA and Title VII are fully realized. One way courts could do this is by taking into account institutional disparities driven by choices made by individual employers that contribute to uneven market outcomes for women. Title IX provides an appropriate analytical framework for this kind of analysis.

C. Title IX and College Sports: An Alternative View of the Market

Unlike Title VII and the EPA, which fall under the EEOC’s jurisdiction, the Office of Civil Rights (“OCR”) within the DOE is responsible for enforcing Title IX.⁸⁹ The OCR recognized early on the potential for colleges to discriminate against women in sports. It sought to address this problem by providing an Intercollegiate Athletics Policy Interpretation.⁹⁰ The 1979 Policy Interpretation⁹¹ provides a three-prong test to determine whether an institution is providing nondiscriminatory participation opportunities to members of both sexes:

- (1) Whether intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments; or

88. *Id.* at 481.

89. 20 U.S.C. § 1681 et seq; 34 C.F.R. § 106.41; *see also* U.S. Dep’t of Ed., *Regulations Enforced by the Office of Civil Rights*, <https://www2.ed.gov/policy/rights/reg/ocr/index.html>.

90. 44 Fed. Reg. 71413 et seq. (1979).

91. OCR clarified and reaffirmed this three-part test in 1996. *See* U.S. Dep’t of Ed., *Clarification of Intercollegiate Athletics Policy Guidance* (Jan. 16, 1996), <https://www2.ed.gov/about/offices/list/ocr/docs/clarific.html#two>.

(2) Where the members of one sex have been and are underrepresented among intercollegiate athletes, whether the institution can show a history and continuing practice of program expansion which is demonstrably responsive to the developing interests and abilities of the members of that sex; or

(3) Where the members of one sex are underrepresented among intercollegiate athletes, and the institution cannot show a history and continuing practice of program expansion, as described above, whether it can be demonstrated that the interests and abilities of the members of that sex have been fully and effectively accommodated by the present program.⁹²

This proportionality requirement under Part 1 of the OCR's three-prong test has been the subject of much controversy. Under this standard, if a school's population is 60 percent female, then around 60 percent of its athletes should be female for it to avoid violating Title IX.⁹³ Critics argue that this requirement is arbitrary and the proper question to ask is not whether a university's sports programs represent its school's population but rather if they represent the proportion of people that are interested in sports, an inquiry under Part 3 of OCR's test. Like supporters of the market force defense, advocates of this "relative interest" approach find it unfair for a college to be held liable for adhering to an external factor outside its control, which in this case is the relative high interest of men in sports compared to women. The First Circuit in *Cohen v. Brown University* outlined what Title IX would look like under the "relative interest" theory:

Suppose a university (Oooh U.) has a student body consisting of 1,000 men and 1,000 women, a one to one ratio. If 500 men and 250 women are able and interested athletes, the ratio of interested men to interested women is two to one. Brown takes the position that both the actual gender composition of the student body and whether there is unmet interest among the underrepresented gender are irrelevant; in order to satisfy the third benchmark, Oooh U. must only provide athletic opportunities in line with the two to one interested athlete ratio, say, 100 slots for men and 50 slots for women. Under this view, the interest of 200 women would be unmet—but there would be no Title IX violation.⁹⁴

Despite its criticism Title IX's proportionality requirement has been upheld and enforced by both Democratic and Republican administrations.⁹⁵ Courts have also refused to overturn OCR's interpretation of the statute.⁹⁶ They've generally

92. 44 Fed. Reg. 71413, 71418 (1979).

93. The standard does not require exact proportionality. OCR also recognizes that an institution's enrollment rate may fluctuate year-to-year and believes it would be "unreasonable to expect the institution to fine tune its program to [a] change in enrollment" if the institution had satisfied Part 1 of the test the previous year. *See id.*

94. 991 F.2d 888, 899 (1st Cir. 1993) ("*Cohen II*").

95. *See* C. Peter Goplerud III, *Title IX: Part Three Could Be Key*, 14 MARQ. SPORTS L. REV. 123, 124 (2003) ("Criticism of Title IX and, in particular, the proportionality aspect of the so-called Three-Part Test led the Bush Administration, through Secretary of Education Roderick Paige, to establish the Secretary of Education's Commission on Opportunity in Athletics in 2002. The Commission conducted numerous hearings and ultimately issued a lengthy report early in 2003. In July 2003, the Assistant Secretary for Civil Rights, Gerald Reynolds, responded to the report with a three-page letter, clarifying a few points of interpretation of Title IX, but largely retaining the status quo regarding its interpretation").

96. *See* National Wrestling Coaches Ass'n v. U.S. Dept. of Educ., 366 F.3d 930 (D.C. Cir. 2004), *cert.*

interpreted Title IX liberally,⁹⁷ finding an implied private right of action for plaintiffs to bring suits for monetary damages against high schools and universities for intentional discrimination;⁹⁸ allowing for retaliation and sexual harassment claims;⁹⁹ and preventing states from avoiding liability by invoking sovereign immunity.¹⁰⁰

The First Circuit's ruling in *Cohen* provides a good example of how courts apply Title IX in the context of college sports.¹⁰¹ A plaintiff class consisting of all present and future Brown University women students and potential students seeking to participate in the school's intercollegiate athletics program brought suit against the university under Title IX after Brown demoted its women's volleyball and gymnastics teams from "varsity" status to "intercollegiate club" status.¹⁰² Varsity teams received funding from the university, while club teams needed to raise their own money in order to survive.¹⁰³ Though Brown had also relegated its men's water polo and golf teams for financial reasons, the plaintiffs alleged that the university's actions violated Title IX because the "men students at Brown already enjoyed the benefits of a disproportionately large share of both the university resources allocated to athletics and the intercollegiate participation opportunities afforded to student athletes."¹⁰⁴ They argued that, while the changes seemed even-handed, they perpetuated Brown's historic discriminatory treatment of women in sports.¹⁰⁵

During both the preliminary injunction hearing and when deciding the case on its merits, the district court considered a myriad of factors when determining if

denied, 545 U.S. 1104 (2005) (stating that even if National Wrestling Coaches Association and other associations representing male athletes had standing to challenge DOE's policy interpretation, their claim would be barred by the Administrative Procedure Act); *See also* *Cohen II*, 991 F.2d at 888 (rejecting Brown University's claim that a university should be able to satisfy Title IX by providing athletic opportunities to the proportion of female students that were interested and able to participate in sports).

97. This was not always the case. The Supreme Court had initially held that Title IX only applied to those institutional activities that directly received federal financial assistance, which in the case of college sports meant a university's athletic department itself. *See* *Grove City v. Bell*, 465 U.S. 555 (1984). It halted all enforcement of Title IX until Congress overruled its holding in *Grove City* by passing the Civil Rights Restoration Act of 1987. Title IX litigation started to take off after the Supreme Court's holding in *Franklin v. Gwinnett County Public Schools*, which allowed plaintiffs to obtain monetary damages under the statute. *See* Jeffrey H. Orleans, *An End to the Odyssey: Equal Athletic Opportunities for Women*, 3 Duke J. Gender L. & Pol'y 131 (1996).

98. *Cannon v. University of Chicago*, 441 U.S. 677, 717 (1979).

99. *See* *Lowrey v. Texas A & M Univ.*, 117 F.3d 242, 248 (5th Cir. 1997) ("holding that a private right of action is implied for employees who suffer unlawful retaliation solely as a consequence of complaints alleging noncompliance with Title IX"); *Brown v. Hot, Sexy and Safer Prods. Inc.*, 68 F.3d 525, 540 (1st Cir. 1995).

100. *See* *Lane v. Pena*, 518 U.S. 187, 198 (1996) (stating in dicta that Congress unequivocally abrogated state sovereign immunity for Title IX).

101. *Cohen v. Brown Univ.*, 101 F.3d 155 (1st Cir. 1996). *cert. denied*, 520 U.S. 1186 (1997) ("*Cohen IV*").

102. *Cohen v. Brown Univ.*, 809 F.Supp. 978, 979-80 (D.R.I. 1992) ("*Cohen I*").

103. *Cohen IV*, 101 F.3d at 162.

104. *Id.* at 163.

105. *Id.*

Brown's actions violated Title IX. It first broke down the total number of varsity athletes by sex and compared it to the student population.¹⁰⁶ It found that of the 897 students participating in varsity sports, 62 percent of them were male and 38 percent were female.¹⁰⁷ The percentage of female varsity athletes was 13 percent less than the percentage of women in the student body, which stood at 51 percent.¹⁰⁸ The court next looked to the composition of the varsity sports themselves. At the time, Brown had a total of 25 university-funded varsity teams: 13 for women and 12 for men.¹⁰⁹ The court noted that "although the number of varsity sports offered to men and women are equal, the selection of sports offered to each gender generates far more individual positions for male athletes than for female athletes."¹¹⁰ Brown offered 479 varsity spots to men but only 312 to women, and the number of intercollegiate club spots for men more than doubled those available to women.¹¹¹ The court also considered the history of athletics at Brown and found that almost all of the men's sports had been around since 1927, while the women's sports were mostly created between 1971 and 1977, after Brown merged with Pembroke College.¹¹² In light of these facts, the district court granted the plaintiffs a preliminary injunction and, on remand, found Brown in violation of Title IX.¹¹³

The First Circuit affirmed both the preliminary injunction and the district court's ultimate holding. In *Cohen II*, it rejected Brown's statutory and constitutional challenges to the preliminary injunction.¹¹⁴ Brown claimed that OCR's three-part test was inconsistent with Title IX. It argued that "to the extent students' interests in athletics are disproportionate by gender, colleges should be allowed to meet those interests incompletely as long as the school's response is in direct proportion to the comparative levels of interest."¹¹⁵ Brown was essentially arguing in favor of the "relative interest" approach for which most Title IX critics advocate. The court rejected Brown's construction of Title IX for a number of reasons. Most importantly, it deemed Brown's vision of Title IX to be inconsistent with the law's purpose because men's programs have had a considerable head start in college sports and looking exclusively at interest would contravene Title IX's directive to avoid "disadvantaging members of an underrepresented sex."¹¹⁶

The First Circuit's rejection of Brown's constitutional claim is also instructive.¹¹⁷ Brown argued that the third part of the OCR's test requiring full and effective accommodation of the underrepresented gender violated the Equal Protection Clause under the Fifth Amendment because it disadvantaged male

106. *Id.*

107. *Id.*

108. *Cohen IV*, 101 F.3d at 163.

109. *Id.*

110. *Id.* at 163-64 (quoting *Cohen v. Brown Univ.*, 879 F.Supp. 185, 189 (D.R.I. 1995) ("*Cohen III*").

111. *Id.* at 163.

112. *Id.*

113. *Id.* at 161.

114. *Cohen II*, 991 F.2d at 888.

115. *Id.* at 899.

116. *Id.* at 900.

117. *Id.*

athletes.¹¹⁸ The court thought this to be unconvincing, noting that “[w]hile it might well be that more men than women at Brown are currently interested in sports, Brown points to no evidence in the record that men are any more likely to engage in athletics than women, absent socialization and disparate opportunities.”¹¹⁹ The court viewed OCR’s regulation as adhering to Congress’s finding that “women, given the opportunity, will naturally participate in athletics in numbers equal to men.”¹²⁰ Even when assuming *arguendo* that OCR’s policy interpretation discriminated against men, the Court found no issue as it is well within Congress’s powers under the Fifth Amendment to remedy past discrimination.¹²¹

Brown challenged OCR’s three-part test again in *Cohen IV* and the First Circuit again rejected it.¹²² It thought Brown’s “relative interest” approach to again be inconsistent with the purpose of Title IX because it legally reinforced the gender-based disparity within the university’s athletic program, thereby contravening Congress’s intent to eliminate sex discrimination in college sports.¹²³ Brown also failed to recognize “that Title IX’s remedial focus is, quite properly, not on the overrepresented gender, but on the underrepresented gender; in this case, women... It is women and not men who have historically and who continue to be underrepresented in sports, not only at Brown, but at universities nationwide.”¹²⁴ The court also found it irrelevant that Brown could show through statistics greater male interest in intercollegiate sports because “rather than providing a true measure of women’s interest in sports, statistical evidence purporting to reflect women’s interest instead provides only a measure of the very discrimination that is and has been the basis for women’s lack of opportunity to participate in sports.”¹²⁵ The court viewed interest and ability as products of opportunity and experience, thus deeming the “relative interest” approach improper for the purposes of Title IX.¹²⁶

II. APPLYING AN ALTERNATE VIEW OF THE MARKET: THE USWNT’S FIGHT WITH ITS EMPLOYER

As discussed in Part I, courts have yet to entertain a response to the market force argument in EPA or Title VII cases that analyzes the employer’s role in shaping the market. This is presumably because they continue to accept traditional assumptions regarding the objectivity and neutrality of the market. The reason why courts find the market force defense compelling is because it seems fundamentally unfair to find that an employer has discriminated in the wages it pays, when it has simply relied on a seemingly external, objective, and neutral measure of value—i.e., the market. Through a market lens, an employer is simply a price-taker, and over time, any discrimination in the market corrects itself

118. *Id.*

119. *Cohen II*, 991 F.2d at 900.

120. *Id.*

121. *Id.* at 901.

122. *Cohen IV*, 101 F.3d at 176.

123. *Id.*

124. *Id.* at 175.

125. *Id.* at 179.

126. *Id.*

through rational actors. To the extent it ties itself to market forces, employers have less room, not more, to allow discriminatory attitudes to enter into their wage decisions. Or so the argument goes.

However, as discussed earlier, employers can exercise discretion in ways that allow their individual choices to impact an employee's objective value in the marketplace. Employers can also implement policies that internalize consumer discrimination into market wages. Employer decisions can foster, as much as reflect, these attitudes. This is especially true in the sports context where the marketing, advertising, and personnel decisions made by employers are often driven and justified by consumer preferences. This has the potential to create a vicious cycle where the discriminatory attitudes of consumers and the decisions made by employers to reinforce such attitudes work together to suppress the potential market value of a given group or individual. For these reasons, courts should reassess the way they address the market force defense and delve deeper into the root cause of market disparities.

Fortunately, courts already have a framework for how to conduct this reassessment: Title IX. When analyzing Title IX violations, courts take into account institutional disparities that have contributed to uneven outcomes between men and women's sports. They have rejected the notion that women are less interested in sports than men and therefore, more resources should be allocated towards men's sports. They acknowledge that any disparity in interest in sports between men and women are often the result of disparate treatment on the part of the university, as well as society more broadly. In light of how individual employers can create and reinforce institutional disparities that may be reflected through market wages, courts should apply the Title IX framework to the market force defense under Title VII and the EPA as well.

What does this look like in the context of the USWNT's EPA claim against the Federation? As Part A of this Section will discuss, the dispute between the two parties thus far has been limited to the terms of the USWNT's previous CBA as it compares to that of the USMNT. The Federation has argued that the pay disparity between the two teams is not as significant as made out to be by the USWNT. More importantly, they have argued that any pay disparity between the two sides is not an EPA violation because it is a result of a smaller market for women's soccer. For the reasons outlined above, a court analyzing this case should not take the purported market at face value but instead look to the institutional factors that have contributed to the uneven market and whether the Federation has been responsible in creating or reinforcing these institutional disparities through its actions. Part B of this Section looks at what some of the institutional factors could be.

A. The Contractual Dispute Between the Two Parties

From 2012 to the end of 2016, the USWNT operated under a memorandum of understanding ("MOU") with the Federation that kept intact the terms of the CBA they last negotiated in 2005.¹²⁷ A series of disputes between the USWNT's Players' Association ("USWNTPA") and the Federation prevented the two sides from

127. See Fletcher, *supra* note 2.

reaching a new agreement before the expiration of the MOU.¹²⁸ The two parties recently negotiated a new CBA, but the USWNT's pending EEOC complaint concerns the terms of the old one, which are broken down in this Section.

Both the USWNT and the Federation agree that a large part of the pay discrepancy between the women's team and the men's team stems from how their respective contracts are structured.¹²⁹ The USWNT sacrificed higher salaries for more stability. Each member of the USWNT earns \$72,000 annually plus a number of bonuses for winning games and major tournaments.¹³⁰ A player on the men's team does not receive compensation for simply being on the roster.¹³¹ They get paid \$5,000 on a per-game basis¹³² and do not make any money if they suffer an injury or fail to secure a roster spot for any given game.¹³³

What the men lack in a steady paycheck, however, they make up in the form of lucrative bonuses. The men receive \$3,166 for each game they win, while the women receive \$1,350.¹³⁴ The men receive \$55,000 for making a World Cup roster and earn bonuses for each point they earn and for every round they advance.¹³⁵ The women earn \$15,000 for a World Cup roster spot and receive no additional bonuses unless they finish at a minimum in fourth place.¹³⁶

The Federation's response to the USWNT's allegations is twofold. First, it disagrees with the factual allegations. It contends that the pay disparity between the USWNT and USMNT at the time of the EEOC complaint was as little as 2.2 percent, though the USWNT has argued that it was as high as 25 percent.¹³⁷ The Federation goes on to argue that the players who submitted the complaint and many other players on the USWNT earn the same amount of money (and in some cases, more money) than players on the men's team.¹³⁸ According to the response filed by the Federation, "Fourteen of the 25 highest-earning U.S. Soccer players over the last four years—a majority—are women, and half of the U.S. Soccer

128. *Id.*

129. See Norah O'Donnell, *Team USA Members on Historic Fight for Equal Pay in Women's Soccer*, CBS NEWS (Nov. 20, 2016), <http://www.cbsnews.com/news/60-minutes-women-soccer-team-usa-gender-discrimination-equal-pay/>.

130. Andrew Das, *Pay Disparity in U.S. Soccer? It's Complicated*, N.Y. TIMES (Apr. 21, 2016), <https://www.nytimes.com/2016/04/22/sports/soccer/usmnt-uswnt-soccer-equal-pay.html>.

131. *Id.*

132. Cork Gaines, *The Difference Between What the US Men's and Women's Soccer Players Make is Shocking*, BUSINESS INSIDER (Apr. 1, 2016), <http://www.businessinsider.com/men-women-us-soccer-player-salaries-2016-4>.

133. Das, *supra* note 130.

134. *Id.*

135. *Id.*

136. Laura Santhanam, *Data: How Does the U.S. Women's Soccer Team Pay Compare to the Men?* PBS (Mar. 31, 2016), <https://www.pbs.org/newshour/nation/data-how-does-the-u-s-womens-soccer-team-pay-compare-to-the-men>.

137. Melissa Isaacson, *U.S. Soccer Federation Says USWNT Earns Only 2.2 Percent Less Than Men*, ESPN (Apr. 21, 2016), <http://www.espn.com/espnw/sports/article/15277241/us-soccer-federation-says-uswnt-earns-only-22-percent-less-men>.

138. Def.[']s] Resp. to Compl., *Hope A. Solo, et al. v. The United States Soccer Federation*, EEOC Charge No. 440-2016-03560 (May 31, 2016).

players to receive over \$1 million in compensation since 2008 are women.”¹³⁹ While this is in fact true, it does not tell the whole story. Though the top ten highest paid women’s players are paid roughly the same as the men that changes significantly as you go further down the list.¹⁴⁰ The 25th highest paid USWNT player since 2008 has earned \$341,721, while the same ranked men’s player has earned \$580,522. This disparity gets even starker: The 50th highest paid women’s and men’s players made \$25,516 and \$246,238, respectively.¹⁴¹

The USWNT also argues that the Federation fails to take into account that the women typically must do more than the men to be assured of their salaries—in short, what the Federation claims is “equal pay” is not for “equal work.” According to former USWNT legal counsel Richard Nichols, “Seventy-five percent of that compensation...over those eight years is directly related to winning championships.”¹⁴² In any given year, both the men and women’s teams play a minimum of 20 exhibition games.¹⁴³ The men could lose all 20 of their exhibition games and the women could win all 20, and the men would still receive greater compensation than the women.¹⁴⁴ If both the men and the women’s teams won all 20 of their exhibition games, the players on the men’s team would earn \$263,320, while players on the women’s team would receive \$99,000.¹⁴⁵ The women have kept pace with men’s salaries by playing 34 more games and winning 44 more games than the men over the past four years.¹⁴⁶

In the alternative, the Federation argues “that to the extent that there are differences in compensation paid to [USWNT] and [USMNT] players, those differences do not establish a violation of Title VII or the Equal Pay Act.”¹⁴⁷ It claims that “any differences in the compensation paid [to the Men’s National Team and Women’s National Team] players are driven by factors other than gender.”¹⁴⁸ These factors include: “the greater amount of revenue produced by the [USMNT]” and “the [USWNT’s] choice to negotiate for a compensation structure substantially different from the [USMNT’s], under which [USWNT] players receive a substantial base salary players that [USMNT] players do not, but lower bonuses for playing in individual games.”¹⁴⁹ The Federation also argues that the relative timing of the USMNT’s CBA in relation to the USWNT’s CBA contributes to the pay disparity between the two teams.¹⁵⁰ Though it does not explicitly mention the market force defense, it relies heavily on the different market for men’s and women’s soccer when making its revenue generation argument:

139. *Id.*

140. *Das, supra* note 130.

141. *Id.*

142. *Id.*

143. *Gaines, supra* note 132.

144. *Id.*

145. *Id.*

146. *Das, supra* note 130.

147. Def.[’s] Resp. to Compl., *Hope A. Solo, et al. v. The United States Soccer Federation*, EEOC Charge No. 440-2016-03560 (May 31, 2016) at *3.

148. *Id.*

149. *Id.*

150. *Id.*

During each World Cup cycle, FIFA awards prize money to participating teams in the Men's and Women's World Cup that [the Federation] largely passes through to its respective players. Owing in part to the fact that the 2014 Men's World Cup generated 50 to 100 times the revenue worldwide as the 2015 Women's World Cup... FIFA awards more prize money to participants in the Men's World Cup tournament.¹⁵¹

It's unclear which way the revenue-generation argument cuts factually. In 2015, the women generated \$23 million in revenue and \$6.6 million in profit.¹⁵² For 2016, the Federation predicted that the women would earn \$17.5 million in revenue and bring in \$5 million in profit.¹⁵³ The men, on the other hand, earned less than \$2 million in profit in 2015 and were projected to lose \$1 million in 2016.¹⁵⁴ The Federation counters that the past two years were anomalies: The men had generated more revenue the previous four years and in some years had doubled the revenue of the women's team.¹⁵⁵ The Federation also points to the fact that for the past eight years, the USWNT was paid more per dollar of event revenue generated than the men's national team.¹⁵⁶

Nevertheless, for the purposes of this paper, it is important to note that market forces underlay much of the arguments for the Federation. Revenue-generation in the context of international soccer is largely a function of TV deals; ticket and merchandise sales; advertising; and compensation from FIFA. The Federation relies on these factors in its revenue-generation argument. It points to the fact that TV ratings for men's games are double on average than what they are for women's games and are four times as high when excluding World Cup games.¹⁵⁷ And, as mentioned earlier, it also relies on the fact that FIFA compensates the two sides differently. For bowing out in the Round of 16 in the 2014 World Cup, the men earned \$9 million as a team.¹⁵⁸ In contrast, the USWNT earned \$2 million as a team from FIFA after winning the Women's World Cup a year later.¹⁵⁹ Of course, acknowledging that these market factors contribute to unequal wages between the USWNT and the USWMNT still begs the question as to the Federation's role in shaping the market itself. Part B addresses this inquiry.

B. Institutional Factors a Court Should Consider When Evaluating the Federation's Market Force Defense

Part A of this section identifies the terms of dispute between the two sides, but it does not provide a complete list of the factors a court should consider when evaluating an affirmative defense tied to market forces. Even when assuming the men's soccer team generates more revenue than the women's team in any given year, it is still important to know whether the Federation contributed to this

151. *Id.*

152. Def.[']s Resp. to Compl., *supra* note 147.

153. *Id.*

154. *Id.*

155. *Id.*

156. Isaacson, *supra* note 137.

157. Das, *supra* note 130.

158. *Id.*

159. *Id.*

disparity. Did the Federation implicitly or explicitly reinforce the unequal market for women's soccer, thereby suppressing the ability of the USWNT to generate the same revenue as the men's team? The factors listed in this Section go beyond what courts have traditionally considered when evaluating the market force defense, but could shed light on the type of analysis courts need to engage in to ensure that employers are not exercising discretion in such a way that contributes to uneven market outcomes.

The TV contracts for the two teams provide a good starting point for this analysis. TV deals account for a substantial portion of revenue for all of the major professional sports leagues in the United States,¹⁶⁰ and the Federation has actively solicited such contracts for its own teams. In May of 2014, the Federation, in conjunction with Major League Soccer ("MLS"),¹⁶¹ signed a new TV deal with ESPN, Fox Sports, and Univision Deportes.¹⁶² The deal tripled MLS's annual TV revenue¹⁶³ and increased TV time for both the men and women's national teams. According to a press release from the Federation:

All three networks will televise both U.S. Men's and Women's National Team matches. ESPN and FOX Sports 1 will split the English-language Men's National Team broadcast package of approximately 10 games per year, and will likewise share the schedule of Women's National Team games. Univision Deportes is the exclusive Spanish language home of U.S. Soccer and will broadcast all of the U.S. Men's National Team games, plus a minimum of four Women's National Team matches each year throughout the duration of the deal.¹⁶⁴

This new television contract involved MLS but not the National Women's Soccer League ("NWSL"). The NWSL recently signed a separate TV deal with A+E Networks that includes a broadcasted game each weekend on the Lifetime

160. TV revenue accounts for almost two-thirds of the revenue for the National Football League. See Greg McFarlane, *How the NFL Makes Money*, INVESTOPEDIA (Apr. 27, 2017), <https://www.investopedia.com/articles/personal-finance/062515/how-nfl-makes-money.asp>. The NBA currently receives around 20 percent of its revenue from a national TV deal, but each franchise receives more from local TV deals. The NBA's revenue from its national TV deal will increase by 180 percent starting in the 2016-2017 season. See Kevin Draper, *What the NBA's New TV Deal Means For the League and For You*, DEADSPIN (Oct. 6, 2014), <http://deadspin.com/what-the-nbas-insane-new-tv-deal-means-for-the-league-a-1642926274>. Major League Baseball receives 30-40 percent of its annual revenue from a combination of its local and national television deals. See Craig Edwards, *Estimated TV Revenues for All 30 MLB Teams*, FAN GRAPHS (Apr. 25, 2016), <https://www.fangraphs.com/blogs/estimated-tv-revenues-for-all-30-mlb-teams/>. During the 2011-2012 season, the most recent year for which the data is available, 81 percent of the NCAA's revenue was generated through its TV deal with CBS and Turner Sports. See NCAA, *Revenue*, (<http://www.ncaa.org/about/resources/finances/revenue>).

161. The Federation does not own MLS the same way it does the NWSL. However, since the Federation is "the governing body of soccer in all its forms in the United States," it sanctions MLS and was actively involved these negotiations.

162. U.S. Soccer, *U.S. Soccer and MLS Sign Landmark TV Deals* (May 12, 2014), <http://www.ussoccer.com/stories/2014/05/12/12/01/140512-ussoccer-mls-tv-deal>.

163. Chris Smith, *Major League Soccer Announces New TV Deals with ESPN, Fox, Univision*, FORBES (May 12, 2014), <https://www.forbes.com/sites/chris-smith/2014/05/12/major-league-soccer-announces-new-tv-deals-with-espn-fox-univision/#756d12da2de7>.

164. U.S. Soccer, *supra* note 187.

Network.¹⁶⁵ Lifetime is not a TV channel traditionally known for sports and A+E Networks President Nancy Dubac acknowledged as such:

It's not a network that's sports related, but it's a network that's women's related... If you look at the coverage of female sports and athletics across any of the broadcasters that participate in league rights and/or sports programming, women are underrepresented, and it's a chance and an opportunity for Lifetime to support that movement and the importance of athletics and competition for girls and women.¹⁶⁶

Lifetime had previously broadcasted WNBA games from 1997-2000.¹⁶⁷ Its viewership ranked 20th overall in 2016.¹⁶⁸ For comparison, ESPN ranked 6th, Fox Sports 1 ranked 41st, and Univision ranked 5th.¹⁶⁹

The TV deals highlight how the Federation has potentially created unequal market outcomes for women's soccer by reinforcing consumer discrimination through its actions. Assuming it cares solely about profit maximization, Univision Deportes did not agree to broadcast all of the USWNT's games the same way it will for the USMNT because it does not believe that the USWNT will attract the same number of viewers, i.e., its consumers will discriminate. For its part, the Federation can claim that this concession was necessary in order to get the deal done and that some exposure for the USWNT on this platform is better than no exposure. Nevertheless, the Federation's decision to agree to a contract that incorporates consumer discrimination should be a factor analyzed by a court assessing the USWNT's claim. TV deals correlate with a professional sports league's revenue,¹⁷⁰ and more revenue means increased salaries for the players.¹⁷¹ To the extent that the pay differences between the USWNT and the USMNT relate to revenue-generation as a function of a smaller market for women's soccer, a court analyzing this case should consider how the Federation's decision to limit the USWNT's TV exposure relates to their potential to generate revenue. This would force the court to look at not only the current TV deal but also how previous TV deals may have impacted both the structure of the present deal and the market for women's soccer as a whole. The Federation's decision to accept a TV deal that

165. Associated Press, *NWSL Lands Landmark Broadcast Deal with A+E Networks, Lifetime*, SPORTS ILLUSTRATED (Feb. 3, 2017), <http://www.si.com/planet-futbol/2017/02/03/nwsl-tv-deal-ae-landmark-broadcast-rights-womens-soccer>.

166. *Id.*

167. *Id.*

168. Michael Schneider, *Most-Watched Television Networks: Ranking 2016's Winners and Losers*, INDIE WIRE (Dec. 27, 2016), <http://www.indiewire.com/2016/12/cnn-fox-news-msnbc-nbc-ratings-2016-winners-losers-1201762864/>.

169. *Id.*

170. See discussion, *supra* note 169.

171. See e.g., Jeff Zillgitt, *NBA Salary Cap will Soar When New TV Money Kicks In*, USA TODAY (Apr. 18, 2015), <https://www.usatoday.com/story/sports/nba/2015/04/18/rising-salary-cap-luxury-tax-threshold-dollar-amounts/25974437/> ("The salary cap and luxury tax line will increase to approximately \$67.1 million and \$81.6 million next season, up from \$63.065 million and \$76.829 million this season and starting in the 2016-17 – when the league's new lucrative multi-billion TV deal kicks in...")

reinforces consumer discrimination is an act of discretion and should be taken into account in the market force defense analysis.

Though this wage-discrimination claim involves the USWNT and not the NWSL, the Federation's actions regarding the NWSL are important in terms of their impact on the market for women's soccer and also need to be considered in the market force defense analysis. By agreeing to broadcast the NWSL on a network known for women's issues more than sports, the Federation is reinforcing the perceived differences between men's and women's bodies that allow them to be treated differently in the market for sports.¹⁷² As Professor Brake argues, there is nothing inherent about women's sports that makes them less profitable; it is society's construction of what sports should look like that prevent women's sports from achieving equal footing with men's sports.¹⁷³ The Federation's decision to broadcast the NWSL on Lifetime reinforces this construction because it treats women's soccer not as a sport that deserves equal footing with men's soccer but instead as something inferior that should be promoted on a network focused on women rather than one focused on sports. Again, the Federation will argue that such a concession was necessary in order to get the deal done and that otherwise, the NWSL may not have any TV exposure at all. They very well may be right. What's undeniable, however, is that this TV deal is a choice made by the Federation and that it is a choice that impacts the market for women's soccer. The fact that this is an exercise of discretion that potentially influences the market for women's soccer should be enough reason for a court to consider it as a factor when evaluating the Federation's market force defense.

Another institutional factor that a court should consider when evaluating what impact the Federation had in influencing the market for women's soccer is the amount of money it has spent on the USWNT compared to the USMNT. In 2015, the Federation spent \$31,116,527 on the USMNT compared to \$10,307,142 on the USWNT.¹⁷⁴ Even when taking into account the amount the Federation spent on the NWSL, 45 percent of the Federation's National Team expenses during this year were spent on the USMNT compared to 17 percent for the USWNT.¹⁷⁵ In 2014, 37 percent of the Federation's budget was spent on the USMNT compared to 18 percent for the USWNT.¹⁷⁶ It is unclear what the extra money for the men's team was spent on: In 2014, both teams played in a total of 15 matches, and in 2015, the USWNT played in seven more matches and won the World Cup.¹⁷⁷ While it is possible that the extra money spent on the USMNT is solely due to the extra wages and benefits they negotiated as part of their CBA, it could also be the case that the extra money is spent in such a way that reinforces market disparity between men's and women's soccer. One such way would be through advertising. If the Federation spends more on advertising for the USMNT than the USWNT, then it

172. See discussion, *supra* note 86.

173. Brake, *supra* note 86.

174. U.S. Soccer, *2015 Audited Financial Statements*, <https://www.ussoccer.com/about/federation-services/resource-center/financial-information>.

175. The rest of expenses included the other national teams the Federation supports including the youth teams, the Paralympic national team, and the beach soccer national team, among others. See *id.*

176. *Id.*

177. See Das, *supra* note 130.

is manipulating the market in a way that either promotes men's soccer at the expense of women's soccer or reinforces preexisting consumer discrimination. Either way, it is an exercise of discretion, and a court evaluating the Federation's defense should ask for a breakdown of its expenses.

Not all of the potential institutional factors cut against the Federation. As discussed earlier, the Federation has taken responsibility to fund and promote the NWSL. Prior to the NWSL, there had been two previous attempts to establish a professional women's soccer league in the United States, but both folded after a few seasons.¹⁷⁸ Although the Federation helped establish a men's domestic league much earlier than it did a women's league,¹⁷⁹ the Federation financially supports the NWSL in a way that it does not need to for MLS.¹⁸⁰ Its commitment towards establishing and financing the NWSL is a factor in its favor.

Similar to establishing the NWSL, the Federation has shown that it is committed to growing women's soccer by creating youth leagues at every level. In addition to the USMNT and the USWNT, the Federation supports a U-23, U-20, U-19, U-18, and U-17 team for both men and women.¹⁸¹ It also supports U-16 and U-15 teams for both boys and girls.¹⁸² In almost all cases, the men's youth programs have been around longer than the women's programs. The men's U-20 team, for example, has been competing since 1962,¹⁸³ while the women's U-20 team has been competing since 2005. The men's U-23 team has been around since 1992, while the women's team started in 2008.¹⁸⁴ To the Federation's credit, its late edition of the comparable women's teams for each age group was due to FIFA not having tournaments for those categories. Whenever FIFA adjusted its age groups for women's soccer, the Federation quickly responded by creating a team for that category.

In addition to advertising, another factor for a court to consider is scheduled game times. It is no secret in sports that "primetime" games played in the evening draw more viewers than games scheduled earlier in the day. Though the Federation would not have complete control over this issue, as game times are also subject to agreements with tournament holders, opponents, and TV networks,

178. See Leander Schaerlaeckens, *How the NWSL Made American Women's Pro Soccer History*, YAHOO SPORTS (Apr. 16, 2016), <https://sports.yahoo.com/blogs/soccer-fc-yahoo/nwsl-makes-history-with-fourth-season-054334254.html>.

179. The North American Soccer League, the predecessor to MLS, was established in 1968. It folded in 1984 and was replaced by MLS in 1996. The league was formed as part of a deal the Federation struck with FIFA that required the Federation to create a domestic men's soccer league that complied with international soccer guidelines in order for the United States to host the 1994 World Cup. See Simon Pyne, *A Short History of MLS*, MLSGB, <https://mlsgb.com/a-short-history-of-mls/>. The Women's United Soccer Association, the first domestic women's soccer league in the United States, was established in 2001 and folded in 2003. Schaerlaeckens, *supra* note 203.

180. From 2011 to 2016, the Federation invested close to \$10 million into the league. See *id.*

181. U.S. Soccer, *All Teams*, <https://www.ussoccer.com>.

182. *Id.*

183. U.S. Soccer, *History of U-20 Men's National Team in World Cup Qualifying*, <https://www.ussoccer.com/stories/2017/02/14/02/44/20170213-feat-u20mnt-history-of-u20-mens-national-team-in-world-cup-qualifying>.

184. U.S. Soccer, *Under-23 Women's National Team*, <https://www.ussoccer.com/us-under23-womens-national-team/about-the-team>.

they would still retain some ability to influence the USWNT's schedule, especially for scheduling friendly matches. If it turns out that the USMNT regularly plays in primetime, while the USWNT regularly plays at noon, an argument can be made that the Federation has influenced the market for soccer in favor of the men's team.

CONCLUSION

While this paper uses the USWNT as a case study, the idea that courts need to reexamine how they perceive the market force defense should not be limited to sports. The framework offered by Title IX is easily transferable to the USWNT's claim because they share the sports context, but courts assessing any and all market force defenses under the EPA or Title VII should take into account the role of the employer in shaping the current market. This will require courts to reevaluate how they think markets work and take into account institutional disparities that may have contributed to the market's current manifestation.

By doing so, courts can ensure that legitimate wage-discrimination claims do not fall through the cracks.